



## Opportunities and challenges seeking accountability for war crimes in Palestine under the International Criminal Court's complementarity regime

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# **Opportunities and challenges seeking accountability for war crimes in Palestine under the International Criminal Court's complementarity regime**

*Thomas Obel Hansen\**

## **1. Introduction**

The International Criminal Court (ICC or Court) is currently conducting a preliminary examination of the situation in Palestine, involving allegations against Israeli authorities and military personnel as well as what the Prosecutor refers to as “Palestinian armed groups”.<sup>1</sup> The preliminary examination – opened in 2015 and currently placed in the so-called phase 2 where prosecutors focus on examining whether the requirements relating to subject-matter jurisdiction are satisfied<sup>2</sup> – creates a framework for advancing accountability norms in the Palestinian context *and* globally for international crimes committed by States with significant (military and diplomatic) resources. However, the road to accountability is anything but straightforward. Indeed, several challenges relating both to the applicable legal framework and broader policy issues, could delay – or potentially even undermine – the accountability process, if not properly understood and managed. One particularly important issue addressed in this Article relates to the ICC's complementarity regime whereby the Court can only proceed with cases that are not subject to active and genuine investigation or prosecution domestically.<sup>3</sup> Whereas this principle is usually seen as something that intrinsically advances accountability norms, this Article questions

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<sup>1</sup> Int'l Criminal Court, Office of the Prosecutor, Report on Preliminary Examination Activities [hereinafter OTP Report on Preliminary Examination Activities], 2017 §§ 51-78.

<sup>2</sup> Int'l Criminal Court, Office of the Prosecutor, Policy Paper on Preliminary Examinations (Nov. 2013), §§ 80-81. [hereinafter OTP Policy Paper on Preliminary Examinations]

<sup>3</sup> Other important issues relating to the ICC's jurisdiction and issues of admissibility, including the ambiguous ‘gravity’ standard, are not addressed in this Article.

whether this is necessarily the case in situations involving global and regional powers,<sup>4</sup> including the Palestine examination.

Contextualizing the Court's activity in Palestine to other ICC interventions that target global or regional powers, at the broadest level this Article contributes to understanding the opportunities and challenges associated with seeking accountability for violations committed by countries with significant resources. It does so by taking the starting point in the ICC's preliminary examination in Palestine, and interrogates this process in light of the broader legal and policy issues that arise in situations where the Court's interventions clash with the interests of such powers. In this sense, the Article aims to shed light on the nature and prospects of an on-going legal process with significant policy ramifications inside and outside of the region, including for the U.S.<sup>5</sup> Beyond contributing to the understanding of key issues at play in

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<sup>4</sup> Although there is no consensus around the concept of global and regional powers – and what States qualify as such – of the countries currently subject to ICC investigation or preliminary examination (Uganda, Democratic Republic of the Congo, Sudan, Central African Republic, Kenya, Libya, Cote d'Ivoire, Mali, Georgia (including allegations against Russia), Afghanistan (including allegations against the U.S.), Colombia, Gabon, Guinea, Iraq (including allegations the U.K.), Nigeria, Palestine (including allegations against Israel), the Philippines, Ukraine (including allegations against Russia) and Venezuela), the U.S. is commonly considered a global power, whereas Russia, the U.K. and – albeit more disputed – Israel are commonly considered regional powers. While some would consider Nigeria a regional power, for the purposes of this Article it makes more sense to not consider Nigeria as such since it lacks the military and diplomatic capacity (or support) that characterizes the other countries and, arguably, provide them with unique opportunities in terms of influencing – and potentially countering – international legal processes. Of course, Israel's ability to exercise such influence is based not only on its own resources, but to a considerable extent on its ability to count on U.S. support. For a discussion of the concept of regional powers, see e.g. Detlef Nolte, *How to Compare Regional Powers: Analytical Concepts and Research Topics*, GER. INST. OF GLOBAL AFF., <https://ecpr.eu/Filestore/PaperProposal/212a550d-597b-4f60-86df-ec73a8e43707.pdf>. This Article uses the terms global and regional powers and countries with significant (military and diplomatic) resources interchangeably.

<sup>5</sup> Concerning policy ramifications in the U.S., see generally David Bosco, *Palestine in The Hague: Justice, Geopolitics, and the International Criminal Court*, 22 GLOBAL GOVERNANCE 155 (2016) (noting at 168 that the opening an investigation “would set in motion intense political maneuvering by all concerned states [...] The impact would likely be most dramatic in the United States, where Congress might consider new legislation limiting US support for and contact with the court.”). For a

the Palestine examination,<sup>6</sup> this is important because much remains to be understood concerning the nature and impact of ICC preliminary examinations;<sup>7</sup> how the ICC's complementarity regime functions in highly sensitive political situations and more broadly the opportunities

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(pro-Israel) discussion of policy ramifications for the U.S., see *Hearing before the H. Comm. on Foreign Affairs Subcomm. on the Middle East & N. Afr. Hearing: "The Palestinian Authority's International Criminal Court Gambit: A True Partner for Peace?"*, 114th Cong. 26-42 (2015) (written testimony of Eugene Kontrovich).

<sup>6</sup> A range of existing studies examine the ICC's Palestine examination. Many of them do so from the perspective of the broader policy ramifications of opening – or failing to open – an investigation or the particular legal standards relating to jurisdiction. In contrast, there has been only limited engagement with issues of complementarity in the context of the Palestine examination. For studies addressing the Palestine examination, see generally Bosco, *supra* note 5; Adam Oler, *The Looming Demise of the ICC's Complementarity Principle: Israel, US Interests, and the Court's Future*, 31 EMORY INT'L L. REV. 1001 (2017); Mohamed El Zeidy, *Ad Hoc Declarations of Acceptance of Jurisdiction: The Palestinian Situation Under Scrutiny*, in THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT (Carsten Stahn ed. 2015); Daniel Benoliel & Ronen Perry, *Israel, Palestine, and the ICC*, 32 MICH. J. INT'L L. 73 (2010); Eugene Kontorovich, *When Gravity Fails: Israeli Settlements and Admissibility at the ICC*, 47 ISR. L. REV. 379 (2014); Eugene Kontorovich, *Israel/Palestine — The ICC's Uncharted Territory*, 11 J. INT'L CRIM. JUST. 979 (2013); Yaël Ronen, *Israel, Palestine and the ICC — Territory Uncharted but not Unknown*, 12 J. INT'L CRIM. JUST. 7 (2014); John Dugard, *Palestine and the International Criminal Court: Institutional Failure or Bias?*, 11 J. INT'L CRIM. JUST. 563 (2013).

<sup>7</sup> As Mark Kersten notes, "the preliminary examination stage presents a unique, if under-theorized, opportunity to potentially affect the behaviour of conflict and post-conflict actors". See Mark Kersten, *Casting a Larger Shadow: Pre-Meditated Madness, the International Criminal Court, and Preliminary Examinations*, in 2 QUALITY CONTROL IN PRELIMINARY EXAMINATIONS 655 (Morten Bergsmo and Carsten Stahn eds., 2018). Recently, however, international criminal law scholars have paid more attention to preliminary examinations. See generally the studies in QUALITY CONTROL IN PRELIMINARY EXAMINATIONS VOL. I & II. (Morten Bergsmo and Carsten Stahn eds., 2018).

and challenges associated with pursuing accountability for crimes committed by States with significant resources.<sup>8</sup>

The Article makes three overarching arguments which advance our understanding of international criminal justice, in particular accountability for violations by States with significant resources. First, whereas the ICC is increasingly scrutinizing the actions of States with significant resources and seems willing to proceed with investigating highly sensitive situations, there are substantial challenges associated with achieving accountability for crimes committed by such States. In part, this is because such have unique possibilities for creating obstacles to accountability and in part because the ICC legal and policy framework is not fully geared to handle such situations. Second, even if there are important variations in government responses, States with significant resources tend to take ICC intervention seriously, and there is some evidence that ICC interventions impact their behavior, although such change in behavior is not necessarily to the benefit of accountability. In part, this is because the launch of an internationally-driven accountability process adds a level of pressure on States by virtue of creating increased scrutiny and awareness of violations and because ICC interventions – including preliminary examinations – carry with them stigma and entail substantial legitimacy costs for States, especially those that claim to generally subscribe to the international rule of law. This in turn creates opportunities for actors seeking to promote accountability norms, though such opportunities are often constrained by counter-action by the relevant State. Third – and related to both of the above arguments – despite being typically viewed as something inherently ‘good’ in terms of advancing accountability norms, the ICC’s complementarity regime often presents challenges for advancing accountability in situations involving States with significant resources. This is partly because such States have unique possibilities to utilize the

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<sup>8</sup> However, some recent studies provide for case specific analysis of these issues. See, e.g., Carla Ferstman, *The International Criminal Court Prosecutor's Preliminary Examination on Afghanistan and Possible Impacts on Accountability for Secret Detention and Rendition* in EXTRAORDINARY RENDITION: ADDRESSING THE CHALLENGES OF ACCOUNTABILITY (Guild, Bigo, and Gibney eds., 2018); Thomas Obel Hansen, *Accountability for British War Crimes in Iraq? Examining the Nexus between International and National Justice Responses*, in 1 QUALITY CONTROL IN PRELIMINARY EXAMINATIONS 399 (Morten Bergsmo and Carsten Stahn eds., 2018).

complementary regime in ways that are detrimental to accountability, including by framing and directing domestic legal processes so as to prolong or otherwise frustrate the pursuit of accountability for those who bear the greatest responsibility for international crimes.

The Article proceeds by describing the background to the ICC's examination in Palestine, including its legal basis, the measures taken by Palestine to trigger the Court's intervention, and the current status of the examination. Next, the Article explains what crimes are under ICC scrutiny and discusses the consequences of this. While much remains unknown for now, one key question to consider in that regard is what actors are likely to be investigated – and potentially prosecuted – should a formal investigation be opened. The Article then proceeds to an analysis of the ICC's complementarity regime, including an assessment of the legal and policy framework and challenges and opportunities associated with giving effect to its values in the Palestine case, and more broadly situations involving allegations against resourceful States. The Article concludes by considering broader policy choices associated with pursuing accountability for crimes by States with significant resources.

## **2. Background and status of the ICC's preliminary examination of the situation in Palestine**

### *2.1. Legal basis for the Palestine examination*

On 16 January 2015, ICC Chief Prosecutor Fatou Bensouda announced that her Office had opened a preliminary examination of the situation in Palestine.<sup>9</sup> This followed a dual-action approach of the government of Palestine. On 1 January 2015, Palestine lodged a declaration under Article 12(3) of the Rome Statute accepting the retroactive jurisdiction of the ICC over crimes committed in the Occupied Palestinian Territory, including East Jerusalem, since June 13, 2014.<sup>10</sup> The day after, the

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<sup>9</sup> Press Release, Int'l Crim. Ct., Office of the Prosecutor, The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine (Jan. 16, 2015), *available at* <https://www.icc-cpi.int/Pages/item.aspx?name=pr1083> [hereinafter OTP Jan. 2015 press release].

<sup>10</sup> The provision reads:

If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the

government made its deposition of instruments of accession to the Rome Statute with the UN Secretary-General. The Rome Statute entered into force for Palestine on 1 April 2015, but due to the Article 12(3) declaration the Court may exercise jurisdiction retrospectively from 13 June 2014.<sup>11</sup>

To complicate the picture further, in May 2018 Palestine submitted a referral under Article 14 of the Rome Statute, requesting the ICC Prosecutor to “investigate, in accordance with the temporal jurisdiction of the Court, past, ongoing and future crimes within the Court’s jurisdiction, committed in all parts of the territory of the State of Palestine”.<sup>12</sup> The referral takes note of the ongoing preliminary examination, and argues that “given the acceleration of settlement-related crimes and their irreversible effect on the lives of Palestinians and on the prospects for a lasting peace, it is imperative that the [ICC Prosecutor] immediately commence an investigation into the crimes herein referred as its highest priority”.<sup>13</sup> The referral “specifies that the circumstances relevant to the present referral include but are not limited to, all matters related to the Israeli settlement regime”, in particular “any conduct, policies, laws, official decisions, and practices that underlie, promote, encourage or otherwise make a contribution to the commission

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exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

See Rome Statute of the International Criminal Court art. 12(3), 17 July, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. Preliminary examinations may be initiated by the Office of the Prosecutor either on the basis of a) information sent by individuals or groups, States, inter-governmental or non-governmental organizations, or “other reliable sources”; b) a referral from a State Party or the UN Security Council; or c) a declaration accepting the exercise of jurisdiction by the Court pursuant to article 12(3) lodged by a State which is not a Party to the Statute. See OTP Policy Paper on Preliminary Examinations, *supra* note 2 §§ 73-76.

<sup>11</sup> *Preliminary Examinations: Palestine*, INT’L CRIM. CT., <https://www.icc-cpi.int/palestine>.

<sup>12</sup> *Referral by the State of Palestine Pursuant to Articles 13(A) and 14 of the Rome Statute* (May 15, 2018) [hereinafter *Referral by the State of Palestine*]. See also *Statement by ICC Prosecutor, Mrs Fatou Bensouda, on the Referral Submitted by Palestine*, INT’L CRIM. CT. OFF. OF THE PROSECUTOR (May 22, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=180522-otp-stat> [hereinafter *OTP Statement on the Referral Submitted by Palestine*].

<sup>13</sup> *Referral by the State of Palestine*, *supra* note 12, § 8.

of these crimes”.<sup>14</sup> While the referral does not in by itself change the nature or status of the preliminary examination or impose any obligation on the ICC Prosecutor to focus on the crimes highlighted in the referral, it does mean that should the Prosecutor decide that the situation in Palestine warrants a full investigation, her Office would not need to seek the authorization of the pre-trial chamber.<sup>15</sup> Beyond these legal ramifications, it is worth noting that ICC interventions triggered by State referrals tend to take a specific direction in that they usually focus on actors that challenge the referring State, as opposed to members of the referring government itself.<sup>16</sup> They also tend to proceed quicker, perhaps in part because of the enhanced cooperation offered by the referring State.<sup>17</sup>

In this sense, the examination in Palestine sets itself apart from other situations involving allegations against States with significant resources in that the legal basis for opening a potential investigation was initially to be found in the Article 12(3) declaration by Palestine and subsequently in the referral made by Palestine. Accordingly, in this case a State Party to the Rome Statute is actively seeking to trigger the Court’s jurisdiction but that referral is intended to target a regional power – Israel – which is not a party to the Statute. In contrast, most other situations involving allegations against global and regional powers are based on the Prosecutor’s use of the *proprio motu* powers.<sup>18</sup> This may turn out to be important because Palestinian authorities are expected to be forthcoming (as are numerous Palestinian and Israeli civil society organization) providing the Court with evidence and other forms

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<sup>14</sup> *Id.* § 11.

<sup>15</sup> See Rome Statute art 15(3). See further hereinafter *OTP Statement on the Referral Submitted by Palestine*.

<sup>16</sup> See e.g. Thomas Obel Hansen, *Reflections on the ICC Prosecutor’s Recent ‘Selection Decisions’*, 17 MAX PLANCK Y.B. OF U.N. L. 125 (2013).

<sup>17</sup> For an analysis of the duration of various preliminary examinations, see Sara Wharton and Rosemary Grey, *Preliminary examinations: A closer look at one of the most important parts of the ICC Office of the Prosecutor’s work*, INTLAWGRRLS (December 8, 2017), <https://ilg2.org/2017/12/08/preliminary-examinations-a-closer-look-at-one-of-the-most-important-parts-of-the-icc-office-of-the-prosecutors-work/>.

<sup>18</sup> The preliminary examination of the situation in Ukraine is also based on an Article 12(3) declaration. See the Annex to this Article for an outline of how other preliminary examinations and investigations involving allegations against global or regional powers were initiated and their current status.



of cooperation needed to take potential cases forward, at least if they relate to alleged Israeli crimes.

The current preliminary examination came in the wake of a previous unsuccessful attempt by Palestine to invoke the jurisdiction of the ICC over crimes in its territory. In 2012, then chief ICC Prosecutor Luis Moreno-Ocampo decided to close the preliminary examination relating to the situation in Palestine on the grounds that Palestine did not amount to a State under the Rome Statute. That decision was made on the basis that the United Nations General Assembly (UNGA) had at the time not recognized Palestinian statehood. The Prosecutor's view therefore was that the Article 12(3) declaration submitted by Palestine in 2009 could not be acted on since only States can submit such declarations under the Rome Statute.<sup>19</sup> What ultimately proved central to the Prosecutor's 2015 decision to proceed with an examination in Palestine was therefore the UNGA's vote in November 2012 to recognize Palestine as a non-member observer State.<sup>20</sup> In turn, ICC membership supports claims for Palestinian statehood, even if ratification of treaties is not a formal criteria for assessing statehood under the Montevideo Convention.<sup>21</sup>

## *2.2. Nature and status of the preliminary examination*

The Prosecutor does not enjoy full investigative powers at the preliminary examination stage. Rather, a preliminary examination – largely unregulated in the ICC's legal framework – is primarily based on a review of documents and aims at determining whether there is a

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<sup>19</sup> See OTP Report on Preliminary Examination Activities 2012 (noting in § 201: "In interpreting and applying article 12 of the Rome Statute, the Office has assessed that it is for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determination whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute and thereby enabling the exercise of jurisdiction by the Court under article 12(1)"). For a discussion of (the lack of) Palestinian statehood at the time and its ramifications for the ICC process, see Daniel Benoliel & Ronen Perry, *Israel, Palestine, and the ICC*, 32 MICH. J. INT'L L. 73 (2010).

<sup>20</sup> See OTP Jan. 2015 press release, *supra* note 9.

<sup>21</sup> See generally Bosco, *supra* note 5. See also Thomas Obel Hansen, *What Are the Consequences of Palestine Joining the International Criminal Court?*, E-INTERNATIONAL REL. (April 2015), <http://www.e-ir.info/2015/04/06/what-are-the-consequences-of-palestine-joining-the-international-criminal-court/>.

basis for opening a formal investigation.<sup>22</sup> According to Article 53(1) of the Rome Statute, in making this determination the Prosecutor shall consider issues of jurisdiction, admissibility and the interests of justice.<sup>23</sup> As noted above, the practice of the ICC Prosecutor varies considerably in terms of how quickly preliminary examinations proceed, making it difficult to predict when exactly a decision will be made to either take forward or terminate the Palestine examination.

The Palestine examination is currently placed in the so-called phase 2, meaning that the Prosecutor continues to focus on assessing whether statutory requirements relating to subject-matter jurisdiction are satisfied.<sup>24</sup> Should the Prosecutor be satisfied that there is a “reasonable basis to believe” that war crimes (or other crimes within the jurisdiction of the Court) have been committed, the examination will proceed to phase 3, during which the Prosecutor will focus on issues of admissibility. This includes an assessment of complementarity, whereby the existence of national proceedings relating to the same conduct

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<sup>22</sup> See generally Carsten Stahn, *Damned If You Do, Damned If You Don't: Challenges and Critiques of Preliminary Examinations at the ICC*, 15 J. INT'L CRIM. JUST. (2017), (noting at 414 that: “The term ‘preliminary examinations’ has marginal importance in the Rome Statute. It appears in Article 15(6) of the Statute, and indirectly in Article 42. It refers broadly speaking to a phase that is ‘not yet an investigation’, but a ‘sort of pre-investigation carried out by the Prosecutor’”). Accordingly, as David Bosco notes, the Office’s discretion is broad during this phase of the Court’s work and neither the Rome Statute nor the Rules of Procedure and Evidence offer any significant guidance on how to conduct preliminary examinations, although they do make clear that the prosecutor may seek additional information and may take oral or written testimony during this phase. See David Bosco, *The International Criminal Court and Crime Prevention: Byproduct or Conscious*, 19 MICH. ST. INT’L L. REV. 163 (2011). For a description of the steps typically taken by the Prosecutor during preliminary examinations, see OTP Policy Paper on Preliminary Examinations, *supra* note 2, §§ 85-88.

<sup>23</sup> For a description of how this analysis is conducted, see OTP Policy Paper on Preliminary Examinations, *supra* note 2, §§ 34-71.

<sup>24</sup> OTP Report on Preliminary Examination Activities 2017, *supra* note 1, § 78. Some observers question whether this sequencing of preliminary examinations whereby “analysis may get stuck at one phase, like jurisdiction, for years, without considering information relating to other phases” is feasible. See Carsten Stahn, *supra* note 22 at 428.

examined by the ICC could lead to a conclusion of inadmissibility.<sup>25</sup> Beyond this narrow legal assessment of complementarity under Article 53(1) (cf. Article 17) of the Rome Statute, the Prosecutor endorses a policy of promoting so-called ‘positive complementarity’, understood as a question of “ending of impunity, by encouraging genuine national proceedings”.<sup>26</sup> As detailed below in this Article, the Prosecutor’s understanding of existing legal processes in Israel and Palestine – as well as the Office’s understanding of the potential for these to ‘improve’ or for new ones to occur – will likely prove decisive for whether, and if so when, the Palestine examination proceeds to a full investigation.

Meanwhile, the Prosecutor’s reports on preliminary examinations imply that the assessment of subject-matter jurisdiction is not straightforward. Indeed, the most recent report on preliminary examination activities of November 2017 suggests that the Prosecutor remains uncertain whether a range of legal requirements relating to subject-matter jurisdiction are satisfied in the Palestine situation. Two specific issues are highlighted in the 2017 report on preliminary examinations, which could prove crucial for the Office’s determination of whether the Court has subject matter jurisdiction, and thus whether it will proceed to phase 3 of the examination and potentially a full investigation.

One issue relates to the legal regime applicable to the situation in the West Bank. In the 2017 report on preliminary examinations, the Prosecutor notes that multiple sources, including the International Court of Justice (ICJ) and the United Nations Security Council (UNSC), have held that the West Bank and East Jerusalem should be considered occupied territory. However, the Prosecutor also takes note of the Israeli view that the area should be seen as “disputed territory”, subject to competing claims, which should result in the rejection of the “de jure application of the Geneva Conventions to the territory”.<sup>27</sup>

Another key issue relates to the legal characterization of the Gaza conflict. The 2017 report on preliminary examinations notes:

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<sup>25</sup> For a description of the assessments undertaken in phase 3, including with respect to complementarity, gravity and the concept of ‘interest of justice’, *see generally* OTP Policy Paper on Preliminary Examinations, *supra* note 2, §§ 42-71.

<sup>26</sup> *Id.* § 93. See further *infra* Section 5.

<sup>27</sup> OTP Report on Preliminary Examination Activities 2017, *supra* note 1, § 69.

The appropriate legal characterisation of the conflict presents several difficulties in light of the *sui generis* nature of the conflict. While most agree on the existence of an armed conflict, the classification of the conflict as one of an international or non-international character, or both existing in parallel, remains subject to significant debate and diverging views. [...] The classification of the 2014 Gaza conflict has an impact on the Office's analysis of particular crimes allegedly committed during the 2014 conflict. While a number of crimes of possible relevance to the situation are substantially similar in the context both of international and non-international armed conflicts, certain war crimes provisions under the Statute appear to be applicable to international armed conflicts only.<sup>28</sup>

These are unusually transparent – some would say uncertain – comments for the Office to make in reports on preliminary examinations regarding its understanding of key legal issues. However, it may well be that these comments should partly be seen as a diplomatic exercise by the Prosecutor to demonstrate that Israel's views are being duly considered.<sup>29</sup>

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<sup>28</sup> *Id.* § 70. It is beyond the scope of this Article to engage the debate as to whether Gaza should be considered occupied territory, but *see generally* Hanne Cuyckens, *Is Israel Still an Occupying Power in Gaza?*, 63 NETH. INT'L L. REV. 275 (2016) (concluding that: "the effective control test at the core of the law of occupation is no longer met and hence Gaza is no longer occupied, but given that Israel nevertheless continues to exercise some degree of control over Gaza and its population, the absence of occupation does not mean the absence of accountability. This responsibility is however not founded on the law of occupation but on general international humanitarian law, potentially complemented by international human rights law".) *See further* David Bosco, *supra* note 5, at 161.

<sup>29</sup> The author has no specific evidence this is the case, but as Carsten Stahn notes, "preliminary examinations often involve a large degree of diplomacy". *See* Carsten Stahn, *supra* note 22, at 418. Research into the behavior of the ICC prosecutors in situations involving global and regional powers suggest that whereas prosecutors may well in principle be committed to applying the same standards to such examinations as it applies to others, they are also sensitive to the ramifications of examining such powers and hence carefully consider any action and statements they make in such examinations. This research also suggests that the policy objective of promoting positive complementarity is a central concern of prosecutors in this regard. *See generally* Thomas Obel Hansen, *supra* note 8.

### **3. Crimes and actors under ICC scrutiny in the Palestine examination, and implications from a complementarity perspective**

To understand the opportunities and challenges seeking accountability for crimes in Palestine under the ICC's complementarity regime, it is necessary to set out the focus of the ICC's preliminary examination, including the crimes and actors currently under scrutiny.

#### *3.1. Crimes currently under scrutiny*

The ICC examination focuses on only a relatively limited – albeit important – range of crimes. Specifically, the examination currently involves an assessment of: 1) settlements activities authorized by Israeli authorities in the West Bank and East Jerusalem; and 2) crimes allegedly committed by the Israel Defence Forces (IDF) as well as Palestinian armed groups during the conflict in Gaza between 7 July and 26 August 2014 ('the 2014 Gaza conflict').<sup>30</sup>

The situation in Palestine is similar to most other ICC situations targeting the conduct of global and regional powers in that it focuses on crimes alleged committed by both parties to a conflict.<sup>31</sup> However, it sets itself apart from other such interventions in that one category of crimes under scrutiny relates to a State-sanctioned policy of settlements and transfer of population.<sup>32</sup> Even if allegations against British and U.S. armed forces and the CIA suggest that crimes were committed systematically and with some form of policy approval, in no other situation involving a State with significant resources has the Court focused explicitly on conduct which if investigated would almost with certainty lead the Prosecutor to examine individual criminal responsibility of the country's senior most officials and decision-makers.<sup>33</sup> This helps understand Israel's response to the ICC

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<sup>30</sup> OTP Report on Preliminary Examination Activities 2017, *supra* note 1, §§ 58-66.

<sup>31</sup> The situation in Iraq stands out in this regard, as it involves allegations against one actor only, namely British service personnel. *See* the Annex to this Article.

<sup>32</sup> *See* the Annex to this Article.

<sup>33</sup> *See also* David Bosco, *How to Avoid Getting Hauled before The Hague*, FOREIGN POL. (Apr. 1, 2015), <https://foreignpolicy.com/2015/04/01/how-to-avoid-getting-hauled-before-the-hague-palestine-international-criminal-court/>.

intervention, discussed further below in this Article.

How then is the ICC Prosecutor describing the conduct subject to analysis in the preliminary examination? Details regarding wording matter in the context of the Prosecutor's reporting on preliminary examinations, and there are some notable changes in the Prosecutor's assessments in the most recent (November 2017) report on preliminary examinations. For one, previous reports explicitly cited to allegations of crimes committed by Hamas,<sup>34</sup> but the 2017 report speaks only in more generic terms about crimes allegedly committed by "Palestinian armed groups".<sup>35</sup> This is an unusual turn which could suggest that this aspect of the examination is not moving forward as 'normal' (if there is anything such as 'normal' in the context of preliminary examinations), since the Prosecutor tends to be more specific concerning the actors allegedly responsible for the crimes examined as the preliminary examination proceeds.<sup>36</sup>

At the same time, it is noteworthy that the 2017 report provides additional details concerning alleged crimes relating to Israeli settlement activities in the West Bank and East Jerusalem. Importantly, the report suggests that the preliminary examination now specifically covers political actors at the highest level, noting that "[i]n March 2017, for the first time in decades, Israel's security cabinet reportedly approved the construction of an entirely new settlement".<sup>37</sup> Leaving aside here the legal and diplomatic obstacles associated with pursuing accountability for incumbent political leaders, this sends a strong message to the Israeli leadership that decisions relating to settlement activities are being scrutinized from the perspective of individual criminal accountability. What is more, the 2017 report cites to UNSC Resolution 2334 of 23 December 2016, which reaffirmed the occupied status of the West Bank,

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<sup>34</sup> OTP Report on Preliminary Examination Activities 2016, *supra* note 1, § 125.

<sup>35</sup> OTP Report on Preliminary Examination Activities 2017, *supra* note 1, § 66.

<sup>36</sup> By way of example, in the preliminary examination of the situation in Afghanistan, the Prosecutor initially referred to acts of torture by "various parties to the conflict", but later publicly identified specific actors as alleged perpetrators, including U.S. armed forces and the CIA. Compare OTP Report on Preliminary Examination Activities 2011 § 26 with OTP Report on Preliminary Examination Activities 2017, *supra* note 1, § 255.

<sup>37</sup> OTP Report on Preliminary Examination Activities 2017, *supra* note 1, § 61.

and explicitly condemned the “construction and expansion of settlements, transfer of Israeli settlers, confiscation of land, demolition of homes and displacement of Palestinian civilians, in violation of international humanitarian law and relevant resolutions”.<sup>38</sup> Some commentators believe this should be seen to suggest that the Prosecutor “may feel freer than ever before to treat Israeli settlements in the West Bank as war crimes”.<sup>39</sup> What seems clear is that the UNSC resolution adds substantial legitimacy to a potential finding by the Prosecutor that the settlement activities amount to a crime that can be prosecuted under the ICC Statute. It could also make further ICC scrutiny of these actions less likely to be subject to the condemnation – or at least deliberate obstruction – of permanent members of the UNSC, although some of these members, including the U.S., will almost certainly not condone that the ICC investigates Israeli settlements.<sup>40</sup>

### *3.2. Monitoring of other crimes and government responses*

Even if other reported crimes – including more recent ones – do not currently form part of the preliminary examination, the ICC Prosecutor continues to monitor developments in Palestine. Notably, on 8 April 2018, Prosecutor Bensouda issued a statement, noting that “[i]t is with

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<sup>38</sup> *Id.* § 69. Demonstrating how political leaders seek to instrumentalize the legal process, following the adoption of UNSC Resolution 2334, Palestinian authorities immediately advocated for the opening of a full investigation, calling on the ICC Prosecutor “to expedite her initial examination into settlements and subsequently proceed to opening a full investigation, now that the UNSC has established that they are illegal.” See Adam Ragson & Yonah Jeremy Bob, *Following UNSC Resolution, PLO Wants ICC to Open Full Investigation Into Settlements*, JERUSALEM POST, Dec. 28, 2016.

<sup>39</sup> See Yonah Jeremy Bob, *Four main take-aways from ICC report on Israel-Palestinians*, JERUSALEM POST, Dec. 4, 2017.

<sup>40</sup> The Trump administration’s views on the examination of the situation in Palestine are not necessarily clear at the time of writing, but it is worth recalling that President Trump’s national security advisor John Bolton is a fierce opponent of the ICC and that the administration has often taken a more pro-Israeli stand on key issues compared to previous U.S. administrations. See generally John B. Bellinger III, *The International Criminal Court and the Trump Administration*, COUNCIL ON FOR. REL. (March, 2018), <https://www.cfr.org/blog/international-criminal-court-and-trump-administration>; Adam Entous, *Donald Trump’s new world order*, THE NEW YORKER, June 18, 2018), available at <https://www.newyorker.com/magazine/2018/06/18/donald-trumps-new-world-order>.

grave concern that I note the violence and deteriorating situation in the Gaza Strip in the context of recent mass demonstrations”.<sup>41</sup> The Prosecutor further observed that since 30 March 2018, “at least 27 Palestinians have been reportedly killed by the Israeli Defence Forces, with over a thousand more injured, many, as a result of shootings using live ammunition and rubber-bullets”, which “could constitute crimes under the Rome Statute”, “as could the use of civilian presence for the purpose of shielding military activities.”<sup>42</sup> The Prosecutor reminded all parties that the situation in Palestine is under preliminary examination, emphasizing that “any new alleged crime committed in the context of the situation in Palestine may be subjected to my Office’s scrutiny”.<sup>43</sup>

The Prosecutor’s statement was widely reported on in Israeli, Palestinian and international media.<sup>44</sup> Prior to the Prosecutor’s statement, Palestinian foreign minister Riyad al-Malki had submitted a letter to the Prosecutor in which he denounced the “escalation of unlawful practices by Israel” in Gaza and called on the ICC to “stop Israel violating international laws in respect of children that may amount to a violation of Israel’s obligations”.<sup>45</sup> Hours after the Prosecutor issued her statement, the IDF leadership announced that it would launch an inquiry into the conduct of its troops in the recent incidents in Gaza.<sup>46</sup>

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<sup>41</sup> See *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the worsening situation in Gaza*, INT’L CRIM. CT. OFFICE OF THE PROSECUTOR (8 April, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=180408-otp-stat>. [hereinafter OTP statement regarding the worsening situation in Gaza].

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> See, e.g., *Israeli Army Orders Investigation of its Response to Gaza Border Protests*, JEWISH TELEGRAPHIC AGENCY (8 Apr. 2018), <https://www.jta.org/2018/04/08/news-opinion/idf-orders-investigation-militarys-response-gaza-border-protests>; Owen Bowcott, *Chief ICC Lawyer Calls for End to Violence Along Gaza Border*, THE GUARDIAN (8 Apr. 2018), <https://www.theguardian.com/world/2018/apr/08/chief-icc-lawyer-calls-for-end-to-violence-along-gaza-border>.

<sup>45</sup> As cited in *Palestinians appeal to ICC to halt alleged Israeli crimes*, THE TIMES OF ISR. (20 Jan. 2018), available at <https://www.timesofisrael.com/palestinians-appeals-to-icc-to-halt-alleged-israeli-crimes/>.

<sup>46</sup> See also *Israel to Probe Gaza Border Deaths Avoiding International Investigation*, ASHARQ AL-AWSAT (10 Apr. 2018),



Leaving aside for now whether this is likely to be a credible inquiry, the IDF's announcement suggests that Israeli authorities are closely monitoring and appear to take seriously ICC activities. Previously, in January 2018, Israel's National Security Council warned members of the Knesset's Foreign Affairs and Defense Committee that the ICC was likely to soon move from the examination to the investigation phase with respect to alleged Israeli crimes.<sup>47</sup>

Israel's response to the ICC's activity in Palestine has varied over time. The most aggressive responses include making efforts to prevent Palestine from joining the ICC; labelling the Court as "anti-Israeli"; stating it will demand from its allies that they stop funding the Court; and making it clear that it will take action to "dismantle" the ICC.<sup>48</sup> However, The Israeli government has more recently used a more conciliatory tone towards the ICC, including opening a 'dialogue' with the Prosecutor and helped facilitate a visit of her Office to Israel and Palestine in October 2016 involving outreach and education activities.<sup>49</sup>

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<https://aawsat.com/english/home/article/1232846/israel-probe-gaza-border-deaths-avoiding-international-investigation>.

<sup>47</sup> Alan Baker notes that the report states that the "opening of an investigation has serious implications for Israel", but also "refers to differing views within Israel's justice and foreign affairs ministries as to the seriousness of this issue, it holds that these ministries nevertheless view the matter with concern and appreciate the need to deal with it at the legal and political levels to remove the threat". Alan Baker also notes that it is "unclear if the fears of the Israeli National Security Council are based on solid information emanating from the Office of the ICC Prosecutor, or merely on conjecture". See Alan Baker, *Palestinian Manipulation of the International Criminal Court*, JERUSALEM CTR. FOR INT'L AFF. (21 Jan. 2018), <http://jcpa.org/will-the-international-criminal-court-disregard-international-law/>.

<sup>48</sup> For an outline of Israeli government behavior and statements, see generally Mark Kersten, *In Its Fight Against the ICC, Israel Takes a Page Out of John Bolton's Playbook*, JUST. IN CONFLICT (20 Jan. 2015), <https://justiceinconflict.org/2015/01/20/in-its-fight-against-the-icc-israel-takes-a-page-out-of-john-boltons-playbook/>; Mark Kersten, *The International Criminal Court Can and Should Investigate Violence in Gaza*, JUST. IN CONFLICT (17 May, 2018), <https://justiceinconflict.org/2018/05/17/the-international-criminal-court-can-and-should-investigate-violence-in-gaza/>.

<sup>49</sup> See *Israel 'Engaging' with ICC over Gaza War Crimes Inquiry: Prosecutor*, REUTERS (3 June 2016), <https://www.reuters.com/article/us-israel-palestinians-icc-idUSKCN0YP1CT>. See also OTP Report on Preliminary Examination Activities 2016, *supra* note 1, § 143; *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, ahead of the Office's visit to Israel and Palestine from 5 to*

Yet, as detailed below in this Article, this change in attitude towards the ICC does not appear to be accompanied by any substantial change in terms of its approach to domestic inquiries into crimes under the ICC's examination.

In simpler terms, the ICC process impacts decision-makers in Israel and Palestine, although – as discussed in more detail below in this Article – it is far from certain this will prove to be an example of what prosecutors refer to as positive complementarity.

### *3.3. What actors are likely to be subject to a potential investigation?*

Should the preliminary examination proceed to a full investigation, what actors are then most likely to be the focus of such an investigation? Some commentators suggest that the Prosecutor may be inclined, at least in the first place, to pursue only members of Hamas for rocket attacks on civilians, because these “would be by far the easiest of all the crimes to prosecute” and because it may be seen by the Prosecutor as politically more feasible.<sup>50</sup> In the view of this author, the Prosecutor would be well advised to pursue both Palestinian and Israeli actors, including those responsible for unlawful settlements.

First, an exclusive focus on crimes by one actor only would almost certainly lead to a new backlash against the Prosecutor for being biased – and should this be Palestinian armed groups, criticism for targeting

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10 October 2016, INT'L CRIM. CT. OFFICE OF THE PROSECUTOR (5 Oc. 2016) (emphasizing that the purpose of the visit was to “undertake outreach and education activities”, but not to “engage in evidence collection in relation to any alleged crimes”; “undertake site visits”; or “assess the adequacy of the respective legal systems to deal with crimes that fall within ICC jurisdiction.”).

<sup>50</sup> See Kevin Heller, *The ICC in Palestine: Be Careful What You Wish For*, JUST. IN CONFLICT 2 Apr. 2015), <https://justiceinconflict.org/2015/04/02/the-icc-in-palestine-be-careful-what-you-wish-for/>.

less resourceful parties to conflicts.<sup>51</sup> This could easily undermine perceptions of the legitimacy of the ICC's intervention in Palestine – and the legitimacy of the Court more broadly – among crucial audiences, including civil society groups and academia.

Second, there would be significant symbolic value in pursuing Israeli violations, in particular settlement activities, as international crimes. It is widely acknowledged that settlements have a severe impact on the Palestinian people as a whole and the prospects for a resolution of the conflict.<sup>52</sup> Other efforts to condemn and put a stop to unlawful Israeli settlement policies and practices, including UNSC resolutions, have so far proven unsuccessful.<sup>53</sup> Adding the dimension of international criminalization would signal clearly the level of international outrage of Israel's decision to continue and expand settlements in blatant violation of international law. In the best event, it could also create a level of deterrence. Although the capacity of the ICC to deter international crimes is widely disputed,<sup>54</sup> the opening of a formal investigation that covers settlement activities is likely to at least make Israeli decision-makers consider the ramifications of being indicted by an international

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<sup>51</sup> For an example of such criticism, see William Schabas, *The Banality of International Justice*, 11 J. INT'L CRIM. JUST. 545 (2013). Specifically concerning the failure of the ICC to so far proceed with an investigation in Palestine, see John Dugard, *Palestine and the International Criminal Court: Institutional Failure or Bias?* 11 J. INT'L CRIM. JUST. 563 (2013). For a more general account of the difficult selection decisions facing the ICC, see Daryl Robinson, *Inescapable Dyads: Why the ICC Cannot Win*, 28 LEIDEN J. INT'L CRIM. L. (2015).

<sup>52</sup> See e.g. Rachele Marshall, *Israeli Settlements Come at a High Price*, 35 WASH. REP. ON MIDDLE EAST AFF. (2016).

<sup>53</sup> See e.g. UN Security Council, *Meeting coverage: Settlement Expansion, Jerusalem Embassy Decision Eroding Prospects for Peace in Middle East*, Special Coordinator Tells Security Council (26 March 2018), <https://www.un.org/press/en/2018/sc13263.doc.htm>.

<sup>54</sup> On the capacity of the ICC to deter, see generally Leslie Vinjamuri, *Deterrence, Democracy, and the Pursuit of International Justice*, 24 ETHICS & INT'L AFF. 191 (2010); Jan Klabbbers, *Just Revenge? The Deterrence Argument in International Criminal Law*, 12 FINNISH Y.B. INT'L L. 251 (2001); James F. Alexander, *The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact*, 54 VILL. L. REV. 1, 10 (2009); David Whippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L. J. 473 (1999-2000); Jo, H., & Simmons, B., *Can the International Criminal Court Deter Atrocity?* INT'L ORG. 70 (2016) 443.

court.

Third, as settlement activities are endorsed as a matter of State policy, they would be relatively straightforward to prove, at least in terms of facts pointing to their occurrence and official authorization.<sup>55</sup> One common barrier in prosecuting international crimes committed by States with significant resources is that plans or policies authorizing or condoning the crimes are typically not written down, making it hard to find ‘smoking guns’. For example, one key challenge advancing accountability for those most responsible for detainee abuse by UK forces in Iraq is that such crimes appear to have taken place on the basis of an institutionally embedded informal system which is apparently not revealed by any written trail.<sup>56</sup> Accordingly, the ICC Prosecutor may have easier access to certain forms of evidence in the situation in Palestine, compared to other situations covering global and regional powers.

Finally, because settlement activities are not subject to any criminal justice inquiry domestically, for reasons set out below in this Article, pursuing this category of crimes would pose far fewer challenges for the ICC under the complementarity regime compared to other reported crimes in the Palestine situation.

Of course, any move by the ICC to investigate and potentially prosecute Israeli officials responsible for settlement activities would bring the Court into a direct confrontation with Israel (and potentially some of its key allies, including the U.S.), which may prove difficult for Court officials to manage. Yet, recent moves by the Prosecutor suggest her Office is entering new territory and has become increasingly willing to directly challenge the interests of global and regional powers. Notably, in late 2017, the Prosecutor almost simultaneously decided to proceed to phase 3 of the examination in Iraq covering war crimes allegedly committed by British service personnel and requested the Chamber’s authorization to open an investigation of the situation in Afghanistan

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<sup>55</sup> As noted above, the 2017 report on preliminary examination activities takes note that Israel’s security cabinet has reportedly approved the construction of new settlements, something that would be straightforward to prove. *See* OTP Report on Preliminary Examination Activities 2017, *supra* note 1, § 61.

<sup>56</sup> *See further* Thomas Obel Hansen, *supra* note 8.

covering war crimes allegedly committed by U.S. armed forces and the CIA.<sup>57</sup> This does obviously not mean that the ICC will ultimately succeed holding to account military commanders or officials of Western powers, but it does suggest that an escalation of the ICC's intervention in Palestine, including a formal investigation of Israeli settlement activities, may not be as far-fetched as many observers seem to think.<sup>58</sup> How the Prosecutor proceeds in the other situations relating to global and regional powers in terms of prioritizing investigation of military commanders and State officials will be carefully watched in Israel as it could set a precedence for how prosecutors will proceed in the Palestine examination.

Taken together, the above indicates that should a formal investigation be opened it is likely to focus on both Palestinian and Israeli actors, including those responsible for authorizing the highly controversial settlement activities. As will be discussed in the following, this has significant ramifications for how the ICC's complementarity regime could play out in the Palestine situation.

#### **4. The legal assessment of complementarity**

Should the Prosecutor ultimately conclude that the ICC has subject-matter jurisdiction over crimes in Palestine and proceed to the next phase of the examination, how then would the Office approach the

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<sup>57</sup> See OTP Report on Preliminary Examination Activities 2017, *supra* note 1, § 203; *The Prosecutor of the International Criminal Court, Fatou Bensouda, Requests Judicial Authorisation to Commence an Investigation into the Situation in the Islamic Republic of Afghanistan*, INT'L CRIM. CT. OFFICE OF THE PROSECUTOR (20 November 2017), available at <https://www.icc-cpi.int/Pages/item.aspx?name=171120-otp-stat-afgh> (hereinafter 'OTP Afghanistan investigation request'). For a discussion of the prospects of bringing cases against US armed forces and the CIA, see also Thomas Obel Hansen, *International Criminal Court Indictments of US officials are not Impossible*, JUST SECURITY (5 January 2018), <https://www.justsecurity.org/50638/international-criminal-court-indictment-u-s-officials-impossible/>.

<sup>58</sup> For an example of such skepticism, see Kevin Heller, *The ICC in Palestine: Be Careful What You Wish For*, JUST. IN CONFLICT (2 April 2015), <https://justiceinconflict.org/2015/04/02/the-icc-in-palestine-be-careful-what-you-wish-for/>. See also Eugene Kontorovich, *supra* note 6.

assessment of complementarity and what should be the outcome of this assessment?

#### *4.1. Complementarity assessment at the preliminary examination stage*

The principle of complementarity is enshrined in Article 17(1)(a) of the Rome Statute, which provides that:

The Court shall determine that a case is inadmissible where: The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.

Importantly, the Appeals Chamber has endorsed a distinction according to which Article 17 must be applied differently depending on the stage of the ICC proceedings.<sup>59</sup> At the preliminary stages where the Rome Statute speaks of a ‘situation’ as opposed to a ‘case’,<sup>60</sup> and when the suspects have not yet been (publicly) identified, the Appeals Chamber has noted that the inadmissibility test should be based on the question of whether the relevant State is investigating the “same overall conduct” which is being examined by the ICC.<sup>61</sup> In contrast, when a full investigation at ICC level is launched, domestic proceedings must “cover the same individual and substantially the same conduct as alleged in the proceedings before the Court”.<sup>62</sup>

The Prosecutor’s policy paper on preliminary examination states that the Office’s assessment of complementarity at the preliminary examination

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<sup>59</sup> As such, the Appeals Chamber has noted that Article 17 applies to the determination of admissibility at the preliminary stages under Articles 15 and 18 of the Rome Statute (and the Prosecutor’s decision under Article 53(1)) as well as the determination of admissibility under Article 19 where a suspect or a state with jurisdiction challenges the admissibility of a specific case. *See e.g. Prosecutor v Muthaura (Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute’)* (ICC, Appeals Chamber, Case No ICC-01/09-02/11-274, 30 August 2011) ¶ 37 (hereinafter ‘Muthaura Appeal Decision’]

<sup>60</sup> See *Rome Statute* arts 13–15, 18.

<sup>61</sup> See *e.g. Muthaura Appeal Decision*, *supra* note 59, ¶ 38.

<sup>62</sup> *Id.*, ¶ 39.

stage focuses on “potential cases that would likely arise from an investigation into the situation”, defined by factors such as:

- (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).<sup>63</sup>

This is significant because States cannot avoid the opening of an ICC investigation by simply investigating and/ or prosecuting *any* crime or persons relating to the overall conduct examined by the ICC; it needs to be the specific persons and crimes that are subject to the Prosecutor’s scrutiny. Because it is often unclear to the public and the affected State who exactly these persons are at the preliminary examination stage, this may complicate efforts by States – both those genuinely committed to accountability and those not – to avoid the opening of an ICC investigation with reference to the complementarity regime. Turned around, the limited transparency offered by this framework means that the ICC Prosecutor is in reality left with a significant amount of discretion, which may, at least in theory, be used to promote accountability domestically with reference to the policy objective of positive complementarity.<sup>64</sup>

#### 4.2. ‘Inactivity’?

Chambers of the Court have established that the determination of complementarity must rely on a two-fold test whereby any assessment of unwillingness or inability takes place only if it has first been established that there is relevant investigatory or prosecutorial activity

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<sup>63</sup> OTP Policy Paper on Preliminary Examinations, *supra* note 2, § 43.

<sup>64</sup> Unlike later stages, the determination of admissibility at the preliminary examination stage rests with the Prosecutor with no possibilities for judicial review, resulting that States subject to scrutiny on the basis of a referral under Article 14 of the Statute cannot avoid the opening of an investigation if the Prosecutor determines that the admissibility standards are met. Questions of admissibility at later stages are decided by Chambers of the Court, either on their own motion or at the request of the accused or the affected State. See *Rome Statute* arts 18(2) and 19.

in the State concerned.<sup>65</sup> Chambers of the Court have made it clear that such activity can only be said to exist if investigations at the national level are *ongoing*, as opposed to some future planned or scheduled investigations.<sup>66</sup> Further, Chambers have clarified that it is insufficient for a State with jurisdiction over the crimes to merely claim that there is an ongoing investigation. Instead, there must be “concrete evidence of such steps”.<sup>67</sup>

Should there be a total absence of any investigatory or prosecutorial activity domestically – as is the case with respect to Israeli settlement activities<sup>68</sup> as well as alleged Palestinian crimes during the 2014 Gaza conflict<sup>69</sup> – the conclusion would, at least as a matter of principle, seem

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<sup>65</sup> See e.g. Prosecutor v. Katanga, ICC-01/04-01/07-1497, Judgment on the Appeal against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case ¶ 78 (25 September 2009).

<sup>66</sup> See e.g. Prosecutor v. Muthaura, ICC-01/09-02/11-96, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute ¶ 59 (30 May 2011).

<sup>67</sup> See e.g. *Id.*, ¶ 60 (whereas the Chamber held that “a State that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible”, this does self-evidently not apply at the preliminary examination stage).

<sup>68</sup> There has been some legal activity relating to settlement issues, but this has not taken the form of criminal investigations and prosecutions of those responsible for authorizing and implementing the settlement regime as such. Israel’s Supreme Court has refused to entertain the matter of whether the settlement regime is lawful. As David Bosco notes, whereas Palestinian groups and Israeli human rights advocates regularly challenge Israeli occupation practices in court, “for all its independence, the top Israeli court has repeatedly avoided the question of whether Israeli settlements in the West Bank are legal”. See David Bosco, *supra* note 33 (further noting that “[i]n a series of cases, the Supreme Court has punted, deciding that settlements are a political question that should be resolved through international negotiations” and that “In the case of the settlements, the court has issued countless rulings on the legality of individual settler homes, and sometimes even entire settlements, but it has consistently refused to adjudicate the legality of the broader policy of creating settlements themselves under international law”). On the Israeli legal processes, see also David Kretzmer, *The Law of Belligerent Occupation in the Supreme Court of Israel*, 94(885) INT’L REV. RED CROSS 207 (2012).

<sup>69</sup> Human Rights Watch notes that the Palestinian Authority government in the West Bank and Hamas in Gaza are not known to have carried out any investigations of alleged war crimes committed by Palestinian armed groups, including the deliberate or indiscriminate firing on civilians in Israel. See Human Rights Watch, *Palestine:*



straightforward: The ICC Prosecutor can only conclude that there remains a situation of ‘inactivity’, and on this basis proceed to a full investigation (if finding that other Statutory requirements are satisfied). However, as discussed below in this Article, even in such situations the policy objective of positive complementarity may lead the ICC Prosecutor to ‘delay’ such a finding if the Office perceives there is a possibility that such domestic legal activity may be activated by other action taken by the Office or for other reasons. It is certainly a possibility that the Palestine examination will remain an examination for years to come with the Prosecutor making some form of reference to positive complementarity,<sup>70</sup> even if, as this Article argues, this is not a policy choice that will advance accountably in the Palestine situation.

Where some form of investigatory or prosecutorial activity relating to the crimes under ICC examination exists – as is the case for alleged Israeli crimes committed during the 2014 Gaza conflict – the OTP’s analysis is less straightforward. In such situations, one factor relevant to the ICC Prosecutor’s assessment of ‘activity’ is whether there is an “absence of an adequate legislative framework”.<sup>71</sup> Israel’s Ministry of Foreign Affairs emphasizes that the system for investigating alleged crimes by Israel’s armed forces is impartial, complies with international standards and “compares favourably with the investigative mechanisms of other democratic countries”.<sup>72</sup> Independent observers tend to be more

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*ICC Should Open Formal Probe* (June 5, 2016),

<https://www.hrw.org/news/2016/06/05/palestine-icc-should-open-formal-probe>.

<sup>70</sup> See also David Bosco, *supra* note 5 (noting at 166 that the “preliminary examination will almost certainly be a slow, deliberate process”, emphasizing that the ongoing Israeli investigations of its own conduct may provide the ICC Prosecutor a “reason to delay a final decision”).

<sup>71</sup> This includes among other issues an assessment of “the existence of laws that serve as a bar to domestic proceedings, such as amnesties, immunities or statutes of limitation”. See OTP Policy Paper on Preliminary Examinations *supra* note 2, § 48.

<sup>72</sup> The Ministry states:

Israel maintains a multi-layered investigations system, with numerous checks and balances to ensure impartiality before investigative, administrative, and judicial authorities. Israel's military justice system, and its procedures for investigating possible violations of the Law of Armed Conflict, are continually reviewed and updated. The three main components of the military justice system are the Military Advocate General's Corps (“MAG Corps”), the Military Police Criminal Investigation Division (“MPCID”), and the independent Military Courts. Moreover, Israel's military justice system is subject to civilian oversight by the

critical. Notably, the UN Commission of Inquiry expresses concern about “a number of procedural, structural and substantive shortcomings, which continue to compromise Israel’s ability to adequately fulfil its duty to investigate”.<sup>73</sup> Whereas the Commission notes the steps taken by Israel towards bringing its system of investigations into compliance with international standards, it emphasizes that flaws remain with respect to the State’s “adherence to international standards” and concludes that “significant changes are required to ensure that Israel adequately fulfils its duty to investigate, prosecute and hold perpetrators accountable for violations of international humanitarian law and international human rights law”.<sup>74</sup> Israel’s State Comptroller similarly points to shortcomings in the legal framework.<sup>75</sup> Yet, it is not particularly likely that the ICC

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Attorney General of Israel, and subject to judicial review by Israel's Supreme Court, which has adopted doctrines of standing and justiciability that readily allow for petitions regarding IDF activity. In 2010, the Government of Israel created an independent public commission of inquiry headed by a former Justice of Israel's Supreme Court and that included distinguished international legal observers (the “Turkel Commission”). Following a comprehensive review, the Turkel Commission concluded in 2013 that Israel's mechanisms for examining and investigating complaints and claims of violations of the Law of Armed Conflict generally comply with its obligations under international law, and made a number of recommendations to improve these mechanisms further. The Turkel Commission also found that Israel's system compares favourably with the investigative mechanisms of other democratic countries, including Australia, Canada, Germany, the Netherlands, the United Kingdom and the United States. See ISR. MINISTRY OF FOR. AFF., *Israel's Investigation of Alleged Violations of the Law of Armed Conflict* (14 June 2015), <http://mfa.gov.il/MFA/ForeignPolicy/IsraelGaza2014/Pages/Israel-Investigation-of-Alleged-Violations-of-Law-of-Armed-Conflict.aspx>.

<sup>73</sup> UN Commission of Inquiry, *Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council Resolution S-21/1*, A/HRC/29/CRP.4 (24 June 2015) § 618 (hereinafter *Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1*).

<sup>74</sup> *Id.* ¶ 662.

<sup>75</sup> An investigation launched by the State Comptroller in January 2015 and published in March 2018 noted that Israel’s legislation concerning war crimes is not fully in line with international law; that the IDF’s reporting procedure only covers deliberate attacks on civilians (and hence not all war crimes); and that the IDF has no effective investigation policy of allegations of war crimes. See State Comptroller, *Operation ‘Protective Edge’: IDF Activity from the Perspective of International Law, Particularly with Regard to Mechanisms of Examination and Oversight of Civilian and Military Echelons* (March 2018), available at

Prosecutor will conclude there is a situation of inactivity on the basis that Israel's legal framework is inadequate. The Office has never made such a determination in any situation under examination to date, and Israel, with its comparatively sophisticated legal system, is not an obvious candidate to become the first country to be subject to such a judgment.<sup>76</sup>

Another factor, which could prove decisive to the ICC Prosecutor's assessment of 'activity' with respect to the allegations surrounding the 2014 Gaza conflict, is whether there is a "deliberate focus of proceedings on low-level or marginal perpetrators despite evidence on those more responsible".<sup>77</sup> In some situations, the Office observed that it is not sufficient that a limited number of direct physical perpetrators were prosecuted where evidence points to systematic crimes, and on that basis proceeded to request the Chamber's authorization of an investigation.<sup>78</sup> Israel's Ministry of Foreign Affairs states that "Israel is aware of allegations that certain IDF actions during the 2014 Gaza Conflict violated international law [and] Israel reviews complaints and other information it receives suggesting IDF misconduct, regardless of the source, and is committed to investigating fully any credible accusation or reasonable suspicion of a serious violation of the Law of Armed Conflict."<sup>79</sup> Whereas Israel has conducted various inquiries and investigations into the actions of members of its armed forces during the

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<https://www.hrw.org/news/2016/06/05/palestine-icc-should-open-formal-probe>.  
[hereinafter 2018 report by State Comptroller]

<sup>76</sup> As David Bosco notes: "Israel has an active, respected, and independent judiciary that is unique in the region. Its Supreme Court, in particular, enjoys a strong international reputation and has several times challenged sensitive government policies, including in the occupied territories." See David Bosco, *supra* note 33.

<sup>77</sup> Besides the two factors cited here, the Prosecutor also refers to "other, more general issues related to the lack of political will or judicial capacity". See OTP Policy Paper on Preliminary Examinations, *supra* note 2, § 48.

<sup>78</sup> For example, with respect to domestic accountability processes covering members of the Afghan authorities, the Office implies that in light of the allegations of widespread ill-treatment of detainees, it does not view it as sufficient that authorities have prosecuted only two National Directorate of Security officials. See OTP Report on Preliminary Examination Activities 2016 § 217.

<sup>79</sup> See ISR. MINISTRY OF FOR. AFF., *Israel's Investigation of Alleged Violations of the Law of Armed Conflict* (14 June 2015), <http://mfa.gov.il/MFA/ForeignPolicy/IsraelGaza2014/Pages/Israel-Investigation-of-Alleged-Violations-of-Law-of-Armed-Conflict.aspx>.

2014 Gaza conflict, the scope of these investigations is limited and they appear to focus exclusively on low-level perpetrators.<sup>80</sup> In a June 2016 report, Human Rights Watch observed that there had been no “meaningful progress in providing justice for serious laws-of-war violations during the 2014 conflict”, emphasizing that “whereas Israeli military inquiries into the 2014 Gaza hostilities are ongoing, thus far only two soldiers have been charged with looting about US\$600 from a Palestinian home and a third with covering it up”.<sup>81</sup> In January 2018, an Israeli military court convicted one additional soldier of manslaughter for what Amnesty International reports was an “an apparent extrajudicial execution”, and sentenced him to 18 months in prison.<sup>82</sup> In August 2018, the IDF closed its largest investigation into incidents relating to the 2014 Gaza conflict, known as the ‘Black Friday probe’, without recommending that any charges be brought.<sup>83</sup> The report by the

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<sup>80</sup> Levy and Rozenzweig note that Israel’s Military Advocate General Corps has received about 100 communications regarding “irregular events” during the 2014 Gaza conflict, which were forwarded to the new General Staff investigative apparatus (used for the first time in connection with this operation) for further investigation, and that, additionally, the Military Advocate General opened 19 criminal investigations against soldiers who were suspected of violations of the laws of warfare, but “not a single soldier has been tried, not even at the disciplinary hearing level”. See Bar Levy and Shir Rozenzweig, *Israel and the International Criminal Court: A Legal Battlefield*, 19 STRATEGIC ASSESSMENT (2016). For the official description of the General Staff Mechanism for Fact-Finding Assessments (the ‘FFA Mechanism’), which examines “exceptional incidents that occurred during Operation Protective Edge”, see *Israel Under Fire: Operation Protective Edge*, ISR. MINISTRY OF FOR. AFF. <http://mfa.gov.il/MFA/ForeignPolicy/IsraelGaza2014/Pages/IDF-investigating-exceptional-incidents-from-Operation-Protective-Edge-10-Sep-2014.aspx>. For a more optimistic account of the Israeli accountability efforts, see Adam Oler, *supra* note 6, at 1008 (arguing that it is “imperative to recognize the extensive and substantial steps taken by the Israelis themselves to investigate alleged crimes by Operation Protective Edge participant”).

<sup>81</sup> Human Rights Watch, *supra* note 7.

<sup>82</sup> See *Israel and Occupied Palestinian Territories 2017/18*, AMNESTY INTERNATIONAL, <https://www.amnesty.org/en/countries/middle-east-and-north-africa/israel-and-occupied-palestinian-territories/report-israel-and-occupied-palestinian-territories/>.

<sup>83</sup> See *IDF closes largest war crime probe of 2014 Gaza war*, JERUSALEM POST, Aug. 15, 2018, available at <https://www.jpost.com/Israel-News/IDF-closes-largest-war-crimes-probe-of-2014-Gaza-war-564946>; <https://www.jpost.com/Israel-News/What-does-IDF-closing-Black-Friday-war-crimes-probe-mean-for-ICC-565150>.

UN Commission of Inquiry implies that the very limited scope of Israeli investigations covering the 2014 Gaza conflict is no coincidence, noting that “[in many cases, individual soldiers may have been following agreed military policy, but it is the policy itself that may violate the laws of war”.<sup>84</sup>

The existence of investigatory activity which appears to focus solely on low-level perpetrators is a common challenge in situations under the ICC’s scrutiny, including in situations involving States with significant resources and sophisticated legal systems.<sup>85</sup> However, because the scope and outcome of such proceedings is surrounded by a level of uncertainty, they may work to complicate and delay the Prosecutor’s complementarity assessment.<sup>86</sup> Yet, the Prosecutor demonstrated in the

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<sup>84</sup> See *Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1*, *supra* note 73, §§ 640-41 (further noting that Israeli investigations focus “on so-called ‘exceptional incidents’ suggesting a rather narrow approach, which may fail to take into account violations of international law that result from an intentional policy or military command, which itself may fail to comply with international legal obligations [...] In the latest round of violence, no action is known to have been taken by the MAG, in the case of military commanders, and by the Attorney General, with respect to military and civilian leadership, to initiate investigations into the role of senior officials.” The report by Israel’s State Comptroller also points to a range of flaws relating to inquiries into the decision-making process and military action in Gaza in 2014. See *2018 report by State Comptroller*, *supra* note 75.

<sup>85</sup> By way of example, in the situation in Afghanistan, the Prosecutor observes:

Although the US has asserted that it has conducted thousands of investigations into detainee abuse, to the extent discernible, such investigations and/or prosecutions appear to have focused on alleged acts committed by direct physical perpetrators and/or their immediate superiors. None of the investigations appear to have examined the criminal responsibility of those who developed, authorised or bore oversight responsibility for the implementation by members of the US armed forces of the interrogation techniques that resulted in the alleged commission of crimes within the jurisdiction of the Court.

See OTP Report on Preliminary Examination Activities 2017 *supra* note 1, § 268.

Similarly, investigatory activity in the UK relating to the Iraq allegations has so far focused only on direct physical perpetrators, as opposed to the possible liability of commanders and decision-makers who were reportedly responsible for creating or sustaining a system and culture that permitted regular abuse of detainees. See also Thomas Obel Hansen, *supra* note 8 (‘*Accountability for British War Crimes in Iraq?*’ paper), at 423-24.

<sup>86</sup> See also *Pressure Point: The ICC’s Impact on National Justice*, HUMAN RIGHTS WATCH (May 2018), <https://www.hrw.org/report/2018/05/03/pressure-point-iccs->

Afghanistan probe that the Office is ultimately prepared to request the opening of a full investigation in situations where long-lasting domestic accountability measures focus only on direct physical perpetrators.<sup>87</sup>

#### 4.3. 'Ability' and 'willingness'?

Should the ICC Prosecutor conclude that there is not a 'situation of inactivity', her Office will proceed to the second step of the complementarity assessment involving an assessment of whether the relevant State is able and willing to investigate and prosecute the crimes.

The Prosecutor's assessment of *ability* at the preliminary examination stage entails an analysis of "whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to collect the necessary evidence and testimony, unable to obtain the accused, or is otherwise unable to carry out its proceedings."<sup>88</sup> As noted above, it is not particularly likely that the Prosecutor will observe that Israel's legal system is altogether unable to conduct investigations and proceedings even with respect to complex international crimes. However, the question of ability will require particular attention with respect to crimes falling under the jurisdiction of Palestinian authorities, especially in light of their own admission that "its failure to open investigations results from insufficient means to carry out investigations in a territory over which it has yet to re-establish unified control".<sup>89</sup> This

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impact-national-justice/lessons-colombia-georgia-guinea-and [hereinafter '*HRW pressure point*')] (noting at 12 that there is a risk that "domestic authorities producing a certain amount of activity – opening of case files and limited investigative steps – to stave off ICC intervention, but without following through with prosecutions").

<sup>87</sup> See 'OTP Afghanistan investigation request', *supra* note 57.

<sup>88</sup> In conducting this evaluation, the Office considers, *inter alia*, "the ability of the competent authorities to exercise their judicial powers in the territory concerned; the absence of conditions of security for witnesses, investigators, prosecutors and judges or the lack of adequate protection systems; the absence of the required legislative framework to prosecute the same conduct or forms of responsibility; the lack of adequate resources for effective investigations and prosecutions; as well as violations of fundamental rights of the accused". See OTP Policy Paper on Preliminary Examinations, *supra* note 2, §§ 56-57.

<sup>89</sup> As cited in *Report of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1A/HRC/29/52* (24 June 2015) § 73.

could easily lead the Prosecutor to conclude that cases relating to alleged crimes by Palestinian armed groups are admissible since Palestine is unable to investigate.<sup>90</sup> However, as explained below in this Article, an argument can be made that the Prosecutor's approach to positive complementarity must at least partially depend on whether the concerned State is deemed to be unable or unwilling to prosecute.

The Prosecutor's assessment of *unwillingness* to investigate or prosecute at the preliminary examination stage involves an analysis of the standards mentioned in Article 17(2) of the Rome Statute, including whether:

(a) the proceedings were or are being undertaken for the purpose of shielding the person concerned from criminal responsibility for crimes within the ICC jurisdiction, (b) there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice, and (c) the proceedings were or are not conducted independently or impartially and in a manner consistent with an intent to bring the person concerned to justice.<sup>91</sup>

As this partly overlaps with the standards that are assessed under 'activity', we will focus here on the issue of "unjustified delay in the proceedings". In that regard it is noteworthy that the Office's Policy Paper on Preliminary Examinations observes that delays in national proceedings may be assessed in light of indicators "such as, the pace of investigative steps and proceedings; whether the delay in the proceedings can be objectively justified in the circumstances; and whether there is evidence of a lack of intent to bring the person(s)

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<sup>90</sup> It may be however that the Prosecutor will also – or instead – conclude that Palestine is *unwilling* to investigate and prosecute the crimes. In this regard, it is worth noting that the UN Commission of Inquiry concluded that:

[I]nvestigations by Palestinian authorities are woefully inadequate, despite allegations of violations of international humanitarian law by Palestinian actors, leaving Israeli victims without an effective remedy. With respect to the local authorities in Gaza, no steps appear to have been taken to ensure effective investigations into actions by Palestinian armed groups, seemingly owing to a lack of political will.

*Id.*

<sup>91</sup> For a description of the factors taken into account in this regard, see OTP Policy Paper on Preliminary Examinations, *supra* note 2, §§ 50-54.

concerned to justice”.<sup>92</sup> Suggesting that the *intention* of national authorities is key, in some situations the Office has stated that it would accept a (not specified) “reasonable delay” in national proceedings, noting that the fight against impunity “appear to remain a priority” of the relevant national authorities”.<sup>93</sup>

Given the time that has passed since the incidents in Gaza under preliminary examination occurred, the question of whether there has been an ‘unjustified delay’ with respect to taking forward the investigation of these crimes will arise in the Prosecutor’s assessment of willingness. Israeli authorities point to the complexity of its investigations into crimes in Gaza as a factor impacting their duration.<sup>94</sup> This is ‘common practice’, and this aspect of the complementarity assessment has presented significant challenges for advancing accountability in situations involving States with significant resources. Such States may be able to demonstrate that investigations into the conduct of their armed forces are on-going, and claim that these take a long time to complete due to their complexity, but they ultimately lead to no or very limited accountability. In the UK, for example, more than ten years after the alleged crimes took place in Iraq, investigations are said to be still ongoing, but there is little to suggest their continuation will bring about any meaningful accountability.<sup>95</sup> This brings into question whether the ICC Prosecutor would benefit from establishing deadlines for its conclusion of the complementarity assessment at the preliminary examination stage.

As in other cases involving global and regional power, the main challenge for making complementarity work with respect to crimes allegedly committed by Israel is thus not ‘ability’ but ‘willingness’. As

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<sup>92</sup> *Id.* § 52.

<sup>93</sup> The remarks were made in the Guinea examination. *See* OTP Report on Preliminary Examination Activities 2016, *supra* note 1, § 271.

<sup>94</sup> The Ministry of Foreign Affairs explains that “[o]ngoing examinations and investigations take time, due to, amongst other things, the complexity of the issues, the challenges in investigating these types of incidents [...], and the need to coordinate testimony from third parties”. *See Israel’s Investigation of Alleged Violations of the Law of Armed Conflict*, MINISTRY OF FOR. AFF. (14 June 2015), § 457, <http://mfa.gov.il/ProtectiveEdge/Documents/IsraelInvestigations.pdf>.

<sup>95</sup> *See generally* Thomas Obel Hansen, *supra* note 8.



follows from the analysis above, the framework for assessing complementarity during preliminary examinations presents a range of obstacles for advancing accountability, in particular in situations where there is prolonged domestic investigatory activity. As will be discussed below, this brings into question the merits of endorsing a policy objective of positive complementarity in such situations.

## **5. Positive complementarity – an asset or obstacle to accountability for crimes in Palestine?**

### *5.1. Preliminary examinations, positive complementarity and State power*

The principle of complementarity has often been pointed to as the cornerstone of the Rome Statute.<sup>96</sup> The principle is usually perceived of as something inherently ‘good’, because it respects State sovereignty and thereby is thought to encourage State ratification;<sup>97</sup> because it encourages the Court to use its limited resources wisely and focus on crimes that would otherwise be left unaddressed;<sup>98</sup> because it facilitates norm transmission and ultimately promotes accountability as the principle is thought to create a “strong incentive for national implementation”,<sup>99</sup> or because it can “serve as a catalyst through which States Parties are induced to comply with their obligation to investigate and prosecute ICC crimes.”<sup>100</sup>

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<sup>96</sup> See, e.g., Markus Benzing, *The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity* (2003) 7 MAX PLANCK Y.B. OF U.N. L. 591, 593; Jonathan I. Charney, *International Criminal Law and the Role of Domestic Courts* (2001) 95 AM. J. INT’L L. 120; Eve La Haye, *The Jurisdiction of the International Criminal Court: Controversies over the Preconditions for Exercising Its Jurisdiction* (1999) 46 NETH. INT’L L. REV. 1.

<sup>97</sup> See, e.g., F. Mégret, *Why Would States Want to Join the ICC? A Theoretical Exploration Based on the Legal Nature of Complementarity*, in COMPLEMENTARY VIEWS ON COMPLEMENTARITY (J. Kleffner and G. Kor eds., 2006).

<sup>98</sup> See e.g. ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 351 (OUP, 2003).

<sup>99</sup> See e.g. Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1(1) J. INT’L CRIM. JUST. J 86 (2003).

<sup>100</sup> See e.g. Christine Bjork and Juanita Goebertus, *Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya*, 14 YALE HUM. RTS. AND DEV. J. 211 (2011).

With respect to the latter argument, often referred to as a question of ‘positive complementarity’,<sup>101</sup> international criminal law scholarship tends to assume that the potential for this to occur is greatest at the preliminary examinations stage. The expectation typically is that once the ICC Prosecutor opens a preliminary examination, the threat that the Office will proceed to a full investigation will add sufficient pressure on the State in question for it to commence its own proceedings, even if there may be important contradicting national interests. The prevailing view seems to be that the anticipated reaction from a State under preliminary examination is that it will “aggressively and fairly pursue domestic prosecutions of international crimes so as not to trigger the jurisdiction of the ICC over the case and invite the glare of the eyes of the international community upon it”.<sup>102</sup> The argument often is that preliminary examinations present a powerful policy instrument of the ICC Prosecutor because they “entail a high degree of ‘soft power’ due to the large degree of prosecutorial discretion, the indeterminacy of the decision-making process and the strong expressive dimensions of ICC action”.<sup>103</sup> ICC prosecutors have similarly made far-reaching claims concerning the importance of positive complementarity, sometimes implying that the ultimate goal of advancing accountability for international crimes is best achieved by encouraging national authorities to prosecute such crimes in their own. ICC Prosecutor Bensouda argues that the preliminary examination phase “is one of the most remarkable

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<sup>101</sup> The policy paper on preliminary examinations uses the term ‘positive complementarity’ to refer to a situation where national judicial authorities and the ICC “function together” to create an “interdependent, mutually reinforcing international system of justice”.) See OTP Policy Paper on Preliminary Examinations, *supra* note 2, § 100.

<sup>102</sup> The prevailing view is summarized by Bjork and Goebertus, *supra* note 100, at 208. For examples of such expectations to positive complementarity, see e.g. William Burke-White, *Implementing a Policy of Positive Complementarity in the Rome System of Justice* 19(1) CRIM. L. FORUM (2008) 59 (noting at 62 that “the overall goal of the Rome Statute—ending impunity—may be best achieved through [...] encouragement of national prosecutions”); David Bosco, *The International Criminal Court and Crime Prevention: Byproduct or Conscious* 19 MICH. ST. J. OF INT’L L. (2011) 163 (noting at 181 that preliminary examinations can serve as an effective means of catalyzing political will toward prosecution in situations under analysis as they create pressure for national judicial proceedings and the possible incarceration of those responsible for crimes).

<sup>103</sup> See Carsten Stahn, *supra* note 22, at 416.

efficiency tools we have at our disposal as it encourages national prosecutions and prevents or puts an end to abuses”, allowing the Court “to avoid opening investigations and prosecutions when national mechanisms are functioning in accordance with our founding Statute”.<sup>104</sup> The Policy Paper on Preliminary Examinations states that one of the overall goals of preliminary examinations involves the “ending of impunity, by encouraging genuine national proceedings”<sup>105</sup> – a goal sometimes referred to in the Paper as “ending impunity through positive complementarity”.<sup>106</sup> The Paper emphasizes that “a significant part of the Office’s efforts at the preliminary examination stage is directed towards encouraging States to carry out their primary responsibility to investigate and prosecute international crimes”.<sup>107</sup> In practice, the ICC Prosecutor has often been deferential to national proceedings, avoiding to make a final conclusion on complementarity as part of the admissibility assessment, in order to promote positive complementarity.<sup>108</sup>

This begs the question whether the ICC Prosecutor will decide to proceed with an investigation in the Palestine situation in the near future if it deems that the legal requirements to complementarity are currently not satisfied, or if the Office will ‘wait it out’ in the hope that positive complementarity will ultimately work.

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<sup>104</sup> Fatou Bensouda, *Reflections from the International Criminal Court Prosecutor* 45(1) CASE WESTERN RESERVE J. INT’L L. (2012) 505; 508–09 (further noting at 507 that that positive complementarity implies “a proactive policy of cooperation and consultation, aimed at promoting national proceedings and at positioning itself as a sword of Damocles, ready to intervene in the event of unwillingness or inability by national authorities”). Former Chief Prosecutor Moreno-Ocampo famously stated: as “a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency [...] on the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success”. Moreno-Ocampo as cited in Geoff Dancy and Florencia Montal, *Unintended Positive Complementarity: Why International Criminal Court Investigations Increase Domestic Human Rights Prosecutions* 111 AM. J. INT’L L. (2017) 689.

<sup>105</sup> OTP Policy Paper on Preliminary Examinations, *supra* note 2, § 93.

<sup>106</sup> *Id.*, § 100.

<sup>107</sup> *Id.*

<sup>108</sup> See similarly David Bosco, *supra* note 33 (noting that the Prosecutor has been “very deferential to national proceedings (even ones fraught with problems) in places like Colombia, Georgia, and Russia”).

## 5.2. *Why positive complementarity is unlikely to work in the Palestine situation*

Despite optimism among ICC prosecutors and many scholars alike concerning the capacity of preliminary examinations to galvanize domestic accountability processes, there is surprisingly little empirical evidence that ICC preliminary examinations actually ‘trigger’ genuine domestic accountability processes.<sup>109</sup> In fact, the limited empirical research that does exist on the topic often challenges – and sometimes even contradicts – the assumption made by prosecutors that preliminary examinations, through positive complementarity, present the most significant tool for advancing accountability.<sup>110</sup> Importantly, none of the preliminary examinations that have been closed to date were terminated on the basis of an admissibility assessment that domestic processes rendered further ICC action unjustified.<sup>111</sup>

Challenges to making positive complementarity work are likely to be particularly pronounced in situations involving States with significant resources because they are better placed to manage or counter the ICC’s ‘soft power’, or simply because they feel they have less to fear from the ICC.<sup>112</sup> For example, nothing suggests that ICC activity with respect to

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<sup>109</sup> As noted by Dancy and Montal, “little systematic research to date has focused on the relationship between ICC involvement and domestic proceedings”. See Dancy and Montal, *supra* note 104, at 8. See also Paul Seils, *Making complementarity work: Maximizing the limited role of the Prosecutor*, in THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE (C. Stahn and M.M. El Zeidy eds., 2011) 989 (noting at 1012 that whereas publicizing a situation under preliminary examination may well have a “catalytic influence”, “to date there is no proof of it having made a difference”).

<sup>110</sup> See e.g. Dancy and Montal, *supra* note 104.

<sup>111</sup> See further Thomas Obel Hansen, The Policy Paper on Preliminary Examinations: Ending Impunity through ‘Positive Complementarity’? (working paper), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2939139](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2939139).

<sup>112</sup> See however Carsten Stahn, *supra* note 22, at 424 (noting that: “Existing experiences show that ICC engagement has promoted complementarity in countries with a strong rule of law culture. It has been less effective in fragile environments. Domestic political elites may use ICC engagement as a means to advancing their own political agendas”). In the view of this author, there is no reason to assume that political elites in more resourceful States will be less inclined to instrumentalize ICC

the U.S. activities in Afghanistan has prompted U.S. authorities to take more seriously their obligations to prosecute torture and other international crimes. Following a 10-year preliminary examination of the situation in Afghanistan, in November 2017 the Prosecutor finally decided to request the Chamber's authorization of the opening of an investigation, noting that "no national investigations or prosecutions have been conducted or are ongoing against those who appear most responsible" for the crimes allegedly committed by members of the U.S. armed forces and the CIA.<sup>113</sup> Similarly, the ICC Prosecutor sought and obtained permission to open an investigation into the situation in Georgia on the basis that no relevant domestic proceedings had been opened in Russia.<sup>114</sup> The ICC's preliminary examination of the situation in Iraq, involving allegations against British forces, also does not appear to have advanced accountability at the domestic level. Despite assurances by British authorities that they take accountability seriously and their submission that the ICC's preliminary examination should be terminated (in part) on grounds of complementarity, there is little suggestion that this has been – or will prove to be – an example of positive complementarity 'working'.<sup>115</sup> In 2017 the government closed IHAT, the investigative body tasked with looking into Iraq claims and

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processes, and there appears to be no concrete examples of positive complementarity 'working' in such States.

<sup>113</sup> *Public Redacted Version of "Request for Authorisation of an Investigation Pursuant to Article 15"*, INT'L CRIM. CT. OFFICE OF THE PROSECUTOR, 20 November 2017, ICC-02/17-7-Conf-Exp, ICC-02/17-7-Red.20 November 2017 §§ 299; 312. The Prosecutor noted that the complementarity assessment was complicated by the fact that US authorities did not engage her Office.

<sup>114</sup> The Prosecutor determined that, "despite a number of reported verification efforts, no concrete and progressive steps have been taken in Russia to ascertain the criminal responsibility of those involved in the alleged crimes related to the potential case(s) identified in the Request." OTP Report on Preliminary Examination Activities 2015 § 256.

<sup>115</sup> The British government has made it clear that it believes the preliminary examination should be closed, on three grounds: (1) the Court lacks jurisdiction since the crimes were not committed on a large scale; (2) due to the existence of judicial measures in the UK which address crimes in Iraq, the Rome Statute's complementarity regime renders the situation inadmissible; and (3) the information that the preliminary examination is based on is not credible. *See further* Thomas Obel Hansen, *supra* note 8.

fulfilling Britain's obligations under the complementarity regime.<sup>116</sup> Further frustrating the process of seeking accountability for crimes in Iraq, the British government targeted the lawyers involved in the accountability processes and have made broader moves aimed at avoiding a repeat of the legal processes that have emerged in this case, including a proposal to derogate from human rights law so that it no longer applies to situations of armed conflict.<sup>117</sup>

This suggests that mainstream assumptions concerning the value of preliminary examinations for positive complementarity may well be overstated, in particular in situations involving global and regional powers which perceive that they have strong political interests in avoiding legal scrutiny of their armed and security forces – and more broadly their legal and policy security framework.

The particular circumstances surrounding the Palestine examination makes it unlikely that this situation should be different in terms of the ICC's ability to 'push' the authorities of global and regional powers into conducting genuine proceedings against the persons allegedly responsible for the crimes under ICC examination. This is most clearly the case concerning Israeli settlement activities. Since these are authorized by the State and any investigation would automatically lead to the senior most leadership, it is virtually impossible to imagine that the ICC process has the capacity to bring about a genuine domestic legal process, regardless of the stigma associated with ICC intervention and regardless what action the Prosecutor might take in the name of positive

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<sup>116</sup> IHAT was replaced by a smaller team of service police investigators, criticized by human rights organizations for lacking any semblance of an independent investigation. *See id.*

<sup>117</sup> *See also id. See similarly HRW pressure point, supra* note 86, (noting at 7 that Human Rights Watch research "indicates that the ICC's involvement so far has not per se instigated or influenced national proceedings in significant ways").

complementarity.<sup>118</sup> In short, no soft – or hard – power will make Israel pursue state-sanctioned settlement activities as a crime.<sup>119</sup>

This should lead the ICC Prosecutor to abandon any expectation of positive complementarity, at least with regard to these aspects of the Palestine examination. Should the Office find that other Statutory requirements for an investigation are satisfied, there are therefore few reasons to delay it in the hope that ICC soft power will convince Israeli authorities to commence a criminal justice process which would contradict official State policy and target the country's own leadership. With respect to the aspects of the examination that concerns war crimes during the 2014 conflict in Gaza, it is conceivable – but not particularly likely – that perceptions concerning the prospects of an ICC investigation and potential indictments could change the nature and scope of domestic investigations. The political costs of pursuing military commanders means that the cost-benefit analysis is unlikely to change, regardless of how real the prospects of an ICC investigation is.

## 6. Conclusions

ICC activities are increasingly focusing on the conduct of global and regional powers. This presents a significant change in international justice. Yet, for now only one investigation (Georgia) has been opened which targets a global or regional power (Russia), and no arrest warrants

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<sup>118</sup> On the stigma associated with ICC intervention, *see further* Carsten Stahn, *supra* note 22 (observing, *inter alia*, that preliminary examinations “have a strong expressivist dimension [...] They express harm and gravity of alleged violations and set important signals about the type of atrocity situations that international criminal justice cares about”; further noting that one of most important functions of preliminary examinations “lies in their social disapproval of a particular form of behaviour, and their impact on accountability discourse”; and that “[s]pecific findings in a preliminary examination or the mere absence of closure may entail certain stigmas or associations that states, governments or affected entities are keen to avoid”).

<sup>119</sup> On the general challenges to positive complementarity in situations where there is no or only very limited political will domestically for accountability, *see HRW pressure point*, *supra* note 86 (noting at 9: “The extent of opposition to accountability by powerful interests in the country will constrain the OTP’s influence. The lack of full political support for accountability—regardless of stated intention by governments—was a constant across” the case studies examined by Human Rights Watch).

have been issued or trials commenced against any citizen of a global or regional power to date.

Whereas there are multiple reasons for the difficulties associated with advancing accountability for crimes by global and regional powers, this Article has pointed to challenges posed by the ICC's complementarity framework. States with significant resources and sophisticated legal systems have unique opportunities to utilize these to halt quick progression of ICC activity. For example, as appears to be the case with respect to Israeli inquiries into crimes during the 2014 Gaza conflict, they may initiate investigatory activity that delays and complicates the ICC Prosecutor's assessment, but which is not intended to bring about accountability for those most responsible for the crimes. Even when they do not, as is the case with Israeli settlements, the policy framework of positive complementarity, endorsed by ICC prosecutors and many commentators alike, may serve to delay the pursuit of accountability.

Expectations to positive complementarity ought to be low in situations where the legal assessment of complementarity points to inactivity following a sustained period of time, or when identified accountability processes only pursue a limited number of direct physical perpetrators or for other reasons suggest lack of political will to advance accountability domestically. In situations where it is asserted that a global or regional power has proven over a sustained period of time that it is unwilling to investigate and prosecute those most responsible for crimes under ICC examination – as is the case with Israel's settlement activities and crimes committed in the 2014 Gaza conflict – there is little merit in pursuing a policy objective of positive complementarity in the face of State opposition, or even hostility, to accountability. If anything, States with significant resources and sophisticated legal systems ought to be held to more rigorous standards than States which for reasons of limited capacity may experience challenges giving effect to accountability norms. So far, most ICC investigations have focused on the latter category.

Despite the challenges pointed to, the ICC's intervention in Palestine does present an opportunity to advance accountability norms for violations of international law in the country, including Israel's settlement activities and violations reported to be committed by both



parties to the 2014 Gaza conflict. Even if accountability for crimes in Palestine may not happen in any near future, the ICC's intervention is important because it impacts the behavior of actors in the conflict and disseminates particular narratives of the violations, the actors responsible, and the conflict more broadly. In a sense, the Prosecutor's decision to focus on certain crimes – including Israeli settlement activities – 'elevates' public perceptions of the seriousness of the behavior in question and makes it subject to additional international scrutiny and potentially condemnation. In particular, the symbolic and practical importance of potentially adjudicating settlement as a war crime under the Rome Statute should not be underestimated. Even if the Palestine examination may not progress quickly, as long as it remains open it will continue to have significant legitimacy costs for Israel.

## Annex - Overview of ICC activity relating to global and regional powers

→ Progress of ICC activity					
	Israel (Palestine)	Russia (Ukraine)	UK (Iraq)	US (Afghanistan)	Russia (Georgia)
<b>Status of PE/inv</b>	PE announced re-opened in 2015 after initial closure in 2012 / PE currently in phase 2	PE announced opened in 2014 / PE currently in phase 2	PE announced re-opened in 2014 after initial closure in 2006 / PE currently in phase 3	PE announced opened in 2007 / OTP req. to open inv. submitted in Nov 2017 (yet to be decided)	PE announced opened in 2008 / Inv. opened in Oct 2015 (no trials or arrest to date)
<b>Legal basis for PE/inv</b>	Art 12(3) decl. by Palestine + Palestine referral (Palestine State Party)	Art 12(3) decl. by Ukraine	Proprio motu (UK State Party)	Proprio motu (Afghanistan State Party)	Proprio motu (Georgia State Party)
<b>Actors under ICC scrutiny</b>	1) Israeli authorities (re settlements); 2) Israeli armed forces (re Gaza); 3) Palestinian armed groups (re Gaza)	1) 'Self-defense militia' / 'anti-government armed group's; 2) Russian armed forces; 3) Russian authorities; 4) de facto Crimean authorities; 5) pro-Ukrainian forces	1) UK armed forces (war crimes during Iraq war and occupation (2003-08))	1) Taliban; 2) Afghan security forces, 3) US armed forces and CIA (war crimes of torture)	Armed forces of: 1) Georgia, 2) South Ossetia, and 3) Russia
<b>Complementarity assessment</b>	No PE complementarity assessment yet / complementarity could pose obstacle to opening of inv re Israeli crimes in Gaza; unlikely	No PE complementarity assessment yet / unclear if complementarity could pose obstacle to opening of inv	PE complementarity assessment commenced/ complementarity could pose obstacle to opening of inv	PE complementarity assessment completed/ complementarity unlikely to pose obstacle to opening of inv but new info may be taken	PE complementarity assessment completed/ complementarity could pose obstacle re Russia but unlikely re Georgia

	re settlements and Palestinian armed groups			into account at a later stage	
<b>Governments response (by main power)</b>	<u>Shifting (aggressive to conciliatory)/ engaging:</u> •Some engagement with Court •Active steps to undermine accountability: a) efforts to prevent Palestine from joining ICC; b) states will “dismantle this court” •Rejects legitimacy of ICC process on basis that Court is political / “anti-Israeli”	<u>Aggressive / not engaging:</u> •No engagement with Court •Active steps to undermine accountability: withdrew signature to ICC Statute in 2016 •Rejects legitimacy of ICC process on basis that Court is political	<u>Measured / engaging:</u> •Extensive engagement with Court •Active steps to undermine accountability: 1) targeting of involved lawyers; 2) broader moves to avoid repetition of legal process •Rejects legitimacy of ICC process on basis that: a) allegations not credible; b) ICC lacks jurisdiction); c) complementarity	<u>Measured / not engaging:</u> •No (official) engagement with Court • No active steps to date to undermine accountability •Rejects legitimacy of ICC process on basis that ICC does not have jurisdiction over US citizens	[see Russia response under ‘Ukraine examination’]